

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001514-MR

ANDORA LEE SMITH

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE JAMES W. CRAFT, II, JUDGE
ACTION NO. 16-CR-00255

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

COMBS, JUDGE: This case arises from a criminal conviction of a series of charges. After our review, we affirm in part, vacate in part, and remand.

Andora Lee Smith appeals from the Letcher Circuit Court's judgment of conviction entered on September 5, 2017. A jury found Smith guilty of two felonies: first-degree possession of a controlled substance (methamphetamine) and tampering with physical evidence. She was also found guilty of the following

misdemeanors: second-degree possession of a controlled substance (oxycodone); possession of a controlled substance not in its original container; possession of drug paraphernalia; operating a motor vehicle under the influence, first offense; operating a motor vehicle on a suspended or revoked operator's license; operating a motor vehicle without an operator's license; and failure to have an operator's license in her possession while operating a motor vehicle. She was found guilty of the following traffic offenses: operating a motor vehicle with defective equipment; failure to produce proof of insurance; failure to possess valid registration plates; and failure to possess a Kentucky registration receipt.

Smith was sentenced in accordance with the jury's recommendation to serve three-years' imprisonment for her conviction of first-degree possession of a controlled substance and five-years' imprisonment for her conviction of tampering with physical evidence -- with the sentences to run consecutively. The jury recommended that she serve time in the county jail and that she pay fines totaling \$905.00 for the misdemeanor convictions and traffic violations. She was sentenced by the court in accordance with these recommendations and was ordered to pay court costs in the amount of \$160.00. After our review, we affirm in part and vacate in part.

Just before midnight on September 4, 2016, Kentucky State Police Trooper Peace stopped the vehicle being driven by Smith on State Highway 805 in

Jenkins, Kentucky. The vehicle had only one headlight illuminated. It bore a Virginia license plate. Trooper Peace asked Smith for her operator's license, proof of insurance, and registration. Smith was unable to provide Trooper Peace with any of these items. Trooper Peace discovered that the Virginia registration plates had been cancelled. During his interaction with Smith, Trooper Peace observed that her speech was slurred and that she had powder residue around her nostrils. Trooper Peace asked Smith to exit the vehicle.

At the rear of the vehicle, a small blue container (originally containing an Avon skin cream) dropped out of Smith's clothing. Smith immediately stepped on the container. Trooper Peace testified that she did so either to conceal the container from him or to destroy its contents. When Trooper Peace retrieved the container, Smith admitted that it held methamphetamine. Trooper Peace found its contents to consist of a small clear rock (methamphetamine) and two Xanax (alprazolam) tablets. Smith confessed that she had snorted methamphetamine and Xanax one hour before the stop.

Smith consented to a search of her vehicle from which Trooper Peace recovered 36 Percocet (oxycodone) tablets secreted in a cigarette case, another Xanax tablet, and a glass smoking pipe. Smith was tried before a jury. After entry of the judgment of conviction, she filed this appeal.

On appeal, Smith argues that the Commonwealth failed to present sufficient evidence to support her conviction for tampering with physical evidence. She contends that she did not commit a criminal offense by simply dropping contraband on the ground. She acknowledges that the issue is unpreserved for our review.

Even though an allegation of error is unpreserved, we may consider it on appeal if we determine that the error is palpable and that it affects the substantial rights of a defendant. RCr¹ 10.26. We may grant relief where manifest injustice has resulted from the error. *Id.*

An error is palpable if it is “easily perceptible, plain, obvious and readily noticeable.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). “A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.” *Id.* In the case before us, there was no error -- palpable or otherwise.

A person is guilty of tampering with physical evidence when, believing that an official proceeding may be instituted, she destroys, mutilates, conceals, removes or alters physical evidence which she believes will be produced or used in the official proceeding with intent to impair its verity or availability in

¹ Kentucky Rules of Criminal Procedure (RCr).

the official proceeding. KRS² 524.100. Smith contends that the Commonwealth failed to prove that she intended to destroy or conceal the container and/or the controlled substances stored therein with the intent to impair the availability of the evidence because she did little more than step on the container that fell from her clothing. She implies that interpreting the provisions of the criminal statute to encompass her actions would convert a minor possessory offense to a felony with far too severe consequences. We disagree.

Trooper Peace testified that the container came from Smith's clothing and that she attempted either to conceal it from him or to destroy its contents by stepping on it. Smith's active -- but ultimately ineffective -- attempt either to conceal or to destroy the container and/or its contents by stepping on it was not simply an attempt to rid herself of the container so that she might argue that it was not hers. Her intentional act of stepping on the container to conceal or to destroy it and/or its contents was separate and distinct from her possession of the controlled substances. The testimony was sufficient to permit the jury to infer that by her actions, Smith intended to prevent use of the evidence against her in a criminal prosecution.

Moreover, Smith's conviction under this provision did not convert a minor offense (possession of a controlled substance in the first degree is a Class D

² Kentucky Revised Statutes (KRS).

felony) to a felony (tampering with physical evidence is also a Class D felony) with unduly severe consequences. Charging Smith with tampering with the evidence was not an attempt to secure a felony conviction out of a relatively minor offense. The severe sentence recommended by the jury and imposed by the court came as a result of the calculated risk that Smith took in an attempt to avoid her likely conviction for first-degree possession if the container were recovered by Trooper Peace. There was no error.

Next, Smith argues that the instruction to the jury concerning second-degree possession of a controlled substance was erroneous because it permitted the jury to find her guilty without finding that she possessed the prescription Percocet tablets *unlawfully*. She acknowledges that this issue, too, is unpreserved for our review, but she again urges the court to consider the alleged error pursuant to the provisions of our palpable error rule. RCr 10.26.

While a timely objection in the trial court is always necessary to preserve the right of appellate review of a defectively phrased instruction, review under RCr 10.26 is appropriate when an unpreserved error is palpable and when relief is necessary to avoid manifest injustice resulting from a defective instruction.

Martin v. Commonwealth, 409 S.W.3d 340, 346 (Ky. 2013).

A palpable error occurs where “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). “Manifest injustice is found if the error seriously affected the fairness,

integrity, or public reputation of the proceeding.” *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013) (quoting *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012)).

“[C]riminal convictions must rest upon a jury determination that the defendant is guilty of each and every element of the crime with which he is charged.” *Miller v. Commonwealth*, 391 S.W.3d 857, 868 (Ky. 2013) (citing *Thacker v. Commonwealth*, 194 S.W.3d 287, 290 (Ky. 2006)). KRS 218A.1416 provides that a person “is guilty of possession of a controlled substance in the second degree when he or she *knowingly and unlawfully* possesses: a controlled substance classified in Schedules I or II” (Emphasis added).

In this case, the jury was charged in Instruction No. 8 as follows:

You will find the Defendant guilty of **Possession of a Controlled Substance in the Second-Degree** under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about **04 September 2016** and before the finding of the Indictment herein, the Defendant had in her possession a quantity of Percocet containing Oxycodone, a Schedule II Narcotic;

AND

B. That she knew the substance so possessed by her was Percocet.

The Commonwealth acknowledges that the disputed instruction is flawed because it omitted any indication that Smith’s possession of the Percocet had to be *unlawful*

before she could be convicted of possession of a controlled substance in the second degree. But it contends that relief is not available because Smith did not suffer manifest injustice as a result of the omission. We agree.

Trooper Peace testified that he found the 36 Percocet tablets in a cigarette case in the center console of Smith's vehicle. Smith did not testify during the guilt/innocence phase of the trial. She did not present any evidence tending to indicate that she possessed the Percocet tablets pursuant to a valid prescription. Instead, through cross-examination of the Commonwealth's drug analysis expert, Smith sought to show only that the 36 tablets found in her car may not have been Percocet after all. Under these circumstances, relief is not necessary to avoid a manifest injustice. Consequently, Smith is not entitled to the relief she seeks.

Next, Smith argues that her conviction for both the illegal possession of the Percocet tablets and possession of them outside a proper container violates principles of double jeopardy. The error is unpreserved, but the failure to object on these grounds does not constitute a waiver of the right to raise the issue on appeal. *Sherley v. Commonwealth*, 558 S.W.2d 615 (Ky. 1977); *Martin v. Commonwealth*, 170 S.W.3d 374, 377 (Ky. 2005) (“[D]ouble jeopardy questions may be reviewed on appeal despite failure to preserve the issue at trial.” (Citations omitted)).

The Commonwealth appears to concede the double jeopardy violation. In its brief, the Commonwealth explains that the charges against Smith

for illegal possession of the Percocet tablets and her possession of them outside a proper container merge into a single offense. In view of the Commonwealth's response to Smith's argument, we vacate Smith's conviction for possession of a controlled substance in an improper container for which she was sentenced to serve 365 days confinement in the county jail and to pay a fine of \$100.00. *See Bishop v. Commonwealth*, 2017-CA-001793-MR, 2019 WL 103924 (Ky. App. Jan. 4, 2019) (the remedy for a double jeopardy violation is to vacate the lesser of the two offenses).

Smith contends that her convictions for operating a motor vehicle without a license, operating a motor vehicle on suspended /revoked operator's license, and operating a motor vehicle while failing to have an operator's license in her possession violate principles of double jeopardy. Again, the error is unpreserved. However, the Commonwealth again appears to concede that Smith could not have been convicted for more than one of these offenses. In view of the Commonwealth's response to Smith's arguments, we vacate Smith's conviction for operating a motor vehicle on suspended/revoked operator's license for which she was sentenced to serve 90 days' confinement in the county jail and to pay a fine of \$100.00, and her conviction for operating a motor vehicle while failing to have an operator's license in her possession for which she was sentenced to serve 1 day in the county jail.

Smith next contends that her conviction for the traffic offenses of operating a motor vehicle without valid registration plates and operating a motor vehicle without a valid registration receipt (for which she was fined a total of \$40.00) violates principles of double jeopardy. Again, the error is unpreserved. And again, we consider it.

The principle of double jeopardy protects a criminal defendant from multiple punishments for the same offense. *See Hourigan v. Commonwealth*, 962 S.W.2d 860 (Ky. 1998) (citing *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)). Smith contends that the Commonwealth is prohibited from punishing her for two separate traffic offenses for essentially the same conduct.

We need not address the double jeopardy issue in this case because we are not convinced that the traffic citations and resulting fines totaling \$40.00 are penal in nature. Moreover, as discussed below, these fines are to be set aside.

In her final argument, Smith contends that the trial court erred by ordering her to pay court costs and fines in connection with the misdemeanor convictions and traffic violations. Although this issue is unpreserved, it, too, is susceptible of our review. The Commonwealth concedes in its brief that the fines and court costs imposed upon Smith were impermissible because the trial court had determined that she was indigent. *See Roberts v. Commonwealth*, 410 S.W.3d 606

(Ky. 2013) (where appellant was provided court-appointed counsel pursuant to KRS 31.110(2)(b) and was granted the right to appeal *in forma pauperis* pursuant to KRS 453.190, we may assume the trial court determined that she was an indigent person). As a consequence, we vacate that portion of the trial court's judgment that imposed fines and ordered Smith to pay court costs.

The judgment of the Letcher Circuit Court is affirmed in part, vacated in part, and remanded for entry of orders consistent with the portions of our opinion vacating.

ALL CONCUR.

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